Christina Angelina a/p William Bastian & Anor v Newacres Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1-11-171-94
ABDUL KADIR SULAIMAN J
30 JULY 1996

Civil Procedure *— Locus standi — Action by purchaser against vendor of property — Purchaser had assigned rights and interests in sale and purchase agreement to bank in consideration of the bank granting a loan to finance the purchase — Whether assignor has locus standi to institute an action on his own — Whether bank must be joined as a party to the action*

Contract *— Assignment — Absolute assignment — Purchaser assigned rights and interests in sale and purchase agreement to bank in consideration of the bank granting a loan to finance the purchase — Whether assignment was absolute not purporting to be by way of charge only — Whether sufficient notice of assignment given — Civil Law Act 1956 s 4(3)*

Contract *— Sale and purchase of land — Liquidated damages for late delivery — Proper party to institute claim against vendor — Purchaser had assigned rights and interests in sale and purchase agreement to bank in consideration of the bank granting a loan to finance the purchase*

By a sale and purchase agreement dated 2 September 1982 ('the agreement'), the respondents agreed to sell and the appellants agreed to purchase a piece of land with vacant possession together with a double-storey terrace house to be erected thereon ('the property'). It was stated in cl 7 of the agreement that time shall be the essence of the contract in relation to all the provisions of the agreement. To help finance the purchase of the said property, the appellants obtained a loan from United Asian Bank Bhd ('the bank'). The appellants in consideration of the bank having agreed to grant them the said loan, assigned unto the bank absolutely all their rights and interests in and to the said property and under the said agreement. By cl 24 of the assignment, the appellants appointed the general manager or the assistant manager of the bank as their attorney in dealing with the said property on their behalf. On the allegation of late delivery of the said property by the respondents and wrong payment to the respondents of interest on late payment on their part, the appellants issued a summons in the magistrate's court for liquidated damages and for the wrong payment made. The respondents in their defence disputed the liability on the ground that the appellants did not have the locus standi to institute proceedings against them in view of the absolute assignment of all the appellants' rights, title and interest in the said agreement to the bank. The appellants argued that the assignment to the bank by the appellants was not absolute within the context of s 4(3) of the Civil Law Act 1956 ('the Act'). The appellants further argued that the assignment was not an absolute one and that the bank was merely an agent of the appellants, especially having regard to cl 24 of the assignment. Furthermore, there was no written notice in writing of the assignment given to the respondents as

required by s 4(3) of the Act. The learned magistrate dismissed the claim of the appellants on the ground lack of locus standi on the part of the appellants to sue the respondents.

Held, dismising the appeal:

(1) The assignment to the bank was indeed an absolute assignment not purpoting to be a charge only within the meaning of s 4(3) of the Act. The appellants being the assignor therefore cannot maintain the action against the respondents without joining the bank as co-plaintiff, or as a co-defendant in this action against the respondents (see p 554D–F); *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 168 followed; *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 distinguished.

(2) The provision in cl 24 is necessary for the purpose of enforcement against the property in the event of default committed by the appellants in respect of the loan granted. Therefore it cannot be said that the bank was merely an agent of the appellants in dealing with the said property (see p 557A–B).

(3) By delivery of a true copy of the said assignment which is in writing to the respondents, the fact that the assignment by the appellants of all their rights, title and interest in and to the said property and under the said agreement and the full benefit granted thereby and all the remedies for enforcing the same to the bank had been expressly communicated to the respondents, served as an express notice in writing given to the respondents for the purpose of s 4(3) of the Act (see p 557F).

(4) The said assignment passed all the rights of the appellants as assignor in the debt or chose in action to the bank as assignee absolutely. As such, the appellants as assignor have no locus standi to institute this action against the respondents (see p 557G–H).

[Bahasa Malaysia summary

Menurut perjanjian jual-beli bertarikh 2 September 1982 ('perjanjian tersebut'), penentang telah bersetuju menjual dan perayu telah bersetuju membeli sebidang tanah dengan milikan kosong serta rumah teres bertingkat dua yang akan didirikan ('harta tersebut'). Telah dinyatakan dalam fasal 7 perjanjian tersebut bahawa masa adalah intipati kontrak tersebut berkenaan dengan semua peruntukan perjanjian tersebut. Untuk membantu membiayai pembelian harta itu, perayu telah mendapatkan pinjaman dari United Asian Bank Bhd ('bank tersebut'). Sebagai balasan untuk pinjaman tersebut, perayu telah menyerahhak kepada bank secara mutlak semua hak dan kepentingan mereka dalam harta tersebut dan di bawah perjanjian tersebut. Mengikut fasal 24 penyerahhakan itu, perayu melantik pengurus besar atau penolong pengurus bank itu sebagai wakil mereka dalam membut urusan berkenaan harta tersebut bagi pihak mereka. Berdasarkan dakwaan bahawa telah berlaku kelambatan dalam

menyerahkan harta tersebut oleh penentang dan pembayaran yang salah dibuat kepada penentang untuk faedah pembayaran lewat pada pihak mereka, perayu telah mengisukan saman di mahkamah majistret untuk ganti rugi jumlah tertentu dan untuk pembayaran yang telah salah dibuat. Penentang dalam pembelaan mereka telah mempertikaikan liabiliti atas dasar bahawa perayu tidak mempunyai locus standi untuk memulakan prosiding memandangkan bahawa terdapatnya penyerahhakan mutlak kepada bank akan kesemua hak, hakmilik dan kepentingan dalam perjanjian tersebut. Perayu telah berhujah bahawa penyerahhakan itu kepada bank oleh perayu adalah tidak mutlak menurut konteks s 4(3) Akta Undang-undang Sivil 1956 ('Akta tersebut'). Perayu telah berhujah selanjutnya bahawa, merujuk kepada fasal 24 penyerahhakan itu, bank tersebut hanya bertindak sebagai ejen perayu. Tambahan pula tidak ada notis bertulis tentang penyerahhakan itu yang diberikan kepada penentang seperti yang diperlukan oleh s 4(3) Akta tersebut. Majistret yang bijaksana itu telah menolak tuntutan perayu atas dasar bahawa perayu tidak mempunyai locus standi untuk mendakwa penentang.

Diputuskan, menolak rayuan itu:

(1) Penyerahhakan kepada bank merupakan penyerahhakan yang mutlak yang tidak bertujuan bertindak sebagai gadaian sahaja menurut makna s 4(3) Akta tersebut. Maka perayu yang merupakan penyerahhak tidak boleh meneruskan tindakan terhadap penentang tanpa menyatukan bank sebagai plaintif bersama ataupun defendan bersama dalam tindakan ini terhadap penentang (lihat ms 554D–F); *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 168 diikut; *Hoo SeeSen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 dibeza.

(2) Peruntukan dalam fasal 24 adalah perlu untuk tujuan penguatkuasaan terhadap harta tersebut jikalau berlakunya keingkaran yang dilakukan oleh perayu berkenaan dengan pinjaman yang diberikan. Maka ianya tidak boleh dikatakan bahawa bank hanya merupakan ejen perayu dalam menguruskan harta tersebut (lihat ms 557A–B).

(3) Dengan menyerahkan salinan sebenar penyerahhakan itu secara bertulis kepada penentang, hakikat tentang penyerahhakan oleh perayu akan hak, hakmilik dan kepentingan mereka dalam dan kepada harta tersebut dan di bawah perjanjian tersebut dan faedah sepenuhnya yang diberikan dan kesemua remedi untuk menguatkuasakannya kepada bank telah dikomunikasikan dengan jelasnya kepada penentang, diberikan dalam notis nyata secara bertulis kepada penentang untuk tujuan s 4(3) Akta tersebut (lihat ms 557F).

(4) Penyerahhakan itu telah memberikan kesemua hak perayu sebagai penyerahhak dalam hutang ataupun hak dalam tindakan kepada bank sebagai pemegang serahhak secara mutlak. Oleh yang demikian, perayu sebagai penyerahhak tidak mempuyai locus

standi untuk memulakan tindakan ini terhadap penentang (lihat ms 557G–H).] A

Notes

For a case on an absolute assignment, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1153. B

For cases on locus standi, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2272–2290.

Cases referred to

Hoo See Sen & Anor v Public Bank Bhd & Anor [1988] 2 MLJ 170 C

Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268

Legislation referred to

Civil Law Act 1956 s 4(3) D

Halimatunsa'diah bte Abu Ahmad (*Zain & Co*) for the plaintiffs/appellants.
Tan Ming-Li (*Allen & Gledhill*) for the defendants/respondents.

Abdul Kadir Sulaiman J: By a sale and purchase agreement dated 2 September 1982 ('the agreement') the respondents agreed to sell and the E appellants agreed to purchase all of that piece or parcel of land with vacant possession distinguished as Lot 2584, measuring approximately 78.036sq m in area together with a double-storey terrace house to be erected thereon ('the property') for the price of RM42,000 payable by instalments as stated in the Third Schedule. It was stated in cl 7 of the agreement that F time shall be the essence of the contract in relation to all the provisions of the agreement. The building to be erected on the lot purchased was to be completed by the respondents and vacant possession delivered to the appellants within 24 months from the date of the agreement. Failure to deliver vacant possession within the stipulated period would render the respondents liable to pay immediately to the appellants liquidated damages G on a day to day basis at the rate of 10% pa of the purchase price. Clause 21 concerns the outgoing liabilities of the vendor with provisions for indemnity by the purchaser until a separate document of title is issued and the property is transferred to the appellants.

To help finance the purchase of the said property, the appellants H obtained a loan of RM33,600 from United Asian Bank Bhd ('the bank') and by cl 1 of the loan agreement and assignment made on 15 June 1983 ('the assignment'), the appellants in consideration of the bank having agreed to grant them the said loan, assigned unto the bank absolutely all their rights, title and interest in and to the said property and under the said I agreement.

On the allegation of late delivery of the said property by the respondents by 424 days and wrong payment to the respondents of interest on late payment on their part, the appellants issued a summons in the magistrate's court against the respondents for liquidated damages and for

A the wrong payment made. The respondents in their defence disputed liability on the ground that the appellants had no locus standi to institute proceedings against them in view of the absolute assignment of all the appellants' rights, title and interest in the said agreement to the bank. In the alternative, the respondents claimed for a set-off of sums paid as outgoings. At the end of the hearing, the learned magistrate dismissed the claim of the appellants on the ground that the appellants had no locus standi to sue the respondents.

This appeal is by the appellants against the said decision of the learned magistrate in dismissing the claim. The assignment arose because a separate document of title to the said property had not been issued yet by the authorities. Pending the issue of the document of title to the said property, by cl 20 of the assignment, the appellants were to execute a charge over the said property to be held in escrow in favour of the bank to secure the repayment of the balance then due by the appellants to the bank, together with interest thereon and all other monies payable and owing under or by virtue of the assignment at the date of the execution of the charge. Clause 21 of the assignment states:

> (21) This loan agreement and assignment shall remain in force until the charge referred to in cl 20 hereof is duly registered against the registered title to the said property or the whole of the loan secured by the said property together with interest thereon and all other monies payable to the bank hereunder are paid in full, whichever first happens.

Clause 24 of the assignment states:

> [The appellants] irrevocably [appoint] the general manager or the assistant general manager of the bank, his attorney for him and in his name and on his behalf, to assign, sell, let, lease or demise the said property and building or any part thereof and to do all whatsoever acts and execute all whatsoever documents to give effect to such sale, letting, or lease or which the bank may deem necessary on such sale by the bank of the borrower's rights, title and interest in the said property under the power of sale conferred by this loan agreement and assignment and to give a good receipt for the purchase monies received and also to do and perform all whatsoever acts, matter and things necessary or expedient for the registration of this instrument as fully and effectually as the borrower could do himself if he was personally present AND the borrower hereby agrees and undertakes at all times hereafter to ratify and confirm whatsoever the said attorney shall lawfully do or cause to be done in and concerning the said property by virtue of this instrument.

Before the learned magistrate, the gist of the submission of learned counsel for the respondents at the close of the case for the defence is that in the light of the assignment executed by the appellants, the proper plaintiff in the action is the bank or the appellants ought to have joined the bank in the action either as co-plaintiff or as co-defendant. As the suit is in the name of the appellants alone who are the assignors as the plaintiffs against the respondents as the defendants, the claim must fail because as assignors the appellants have no locus standi to institute proceedings against the respondents as the assignment falls within the ambit of s 4(3) of the Civil Law Act 1956 ('the Act'). He based his argument on the authority of *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2

MLJ 268, FC. In that case, the appellant purchased from a developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johor Bahru. Subsequently the appellant entered into a loan agreement with the bank and also executed an assignment of all his rights, title and interest in the property pending the issue of strata title to the bank. The respondent subsequently purchased from the developer the whole shopping and office complex excluding the units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory relief. After the filing of the originating summons the assignment was revoked following the repayment and settlement of the fixed loan. On the preliminary objection raised by the respondent that the action could not be maintained in the name of the appellant as assignor, the Federal Court held that the assignment document in that case was an absolute one not purporting to be a charge only within the meaning of s 4(3) of the Act and therefore the appellant was not competent to maintain the action when it was filed. That case bears similarity to this present case except that the respondents in the present case are the developers themselves and this case does not involve a third party who is the subsequent purchaser of the remaining units of the property of the developer. However, the dissimilarity of the fact would not change the position of the appellants in this case because upon the true construction of the assignment documents, the assignment to the bank is indeed an absolute assignment not purporting to be a charge only within the meaning of s 4(3) of the Act. The appellants being an assignor therefore cannot maintain the action against the respondents without joining the bank as co-plaintiff, or as a co-defendant in this action against the respondents.

Before the learned magistrate, learned counsel for the respondents sought to distinguish *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 from *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170, a Supreme Court decision, contending that the bank here was merely an agent of the appellants because by the said agreement of 2 September 1982, the purchasers were the appellants. Apart from so saying, no further explanation was given by learned counsel as to how the relationship of agent and principal exists between the appellants and the bank. In *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 the appellants were the purchasers, the second respondent was the vendor and the first respondent, the bank. The first respondent there undertook to pay any monies due under the sale and purchase agreement entered into between the appellants and the second respondent. There was a balance of purchase price unpaid. The appellants sued the first respondent for an injunction to restrain them from paying the second respondent the monies due from the appellants to the second respondent on the ground that a greater sum was due from the second respondent to the appellant which also concerned the liquidated damages for late delivery of the said property to the appellants. The Supreme Court held, upon considering the relevant documents, that the appellants had assigned to the first respondent only the rights regarding the property and the appellant's rights under the sale and purchase agreement. The appellants were therefore still bound and continued to be bound to observe and perform all the duties and liabilities under the sale and purchase agreement including the payment of

A the purchase price. As the bank undertook to pay any monies due from the appellants, the bank was therefore only the agent for the appellants. The assignment was therefore not an absolute assignment within the context of s 4(3) of the Act.

In this appeal before me, the essence of the submission by learned B counsel for the appellants is that the assignment to the bank by the appellants is not absolute within the context of s 4(3) of the Act. She referred to cl 21 of the said agreement mentioned above. The assignment to the bank is effective only until such time when the charge mentioned in cl 20 is registered, or until such time when the whole amount of the loan including interest is paid in full, which ever happens first. Therefore, she C contended that it was the intention that the assignment given to the bank by the appellants should not be absolute. In support, she cited a passage from 6 *Halsbury's Laws of England* (4th Ed) at p 16 as follows:

> An assignment which is conditional and not absolute, as, for example, an assignment expressed to be until money advanced is repaid ... is not within D the Act.

What she is in fact saying is that the assignment in this case is not forever but only for a temporary period, ie until either the legal charge is registered upon the availability of the document of title or until the amount due under the loan agreement is fully settled. When either of the events E happens the assignment is extinguished and the bank has no longer any hold over the said property and based on the passage cited from 6 *Halsbury's Laws of England* (4th Ed), such an assignment is not an absolute assignment within the meaning of s 4(3) of the Act. The said section states:

> (3) Any absolute assignment by writing, under the hand of the assignor, F not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee G under the law as it existed in the state before the date of the coming into force of this Act to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

In *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] H 2 MLJ 268 the relevant provisions of cl 1 of the assignment agreement stated:

> That in consideration of the bank having agreed to grant the loan the assignor as beneficial owner hereby assigns absolutely to the bank all his rights, title and interest in and to the said property and under the said sale I agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Clause 1 of the said assignment in this case entered into between the appellants and the bank is as follows, which without doubt is in pari materia with that cl 1 of the assignment in the facts of the case of *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd*:

> In consideration of the bank having agreed to grant to the borrowers (the appellants) a loan of Ringgit thirty three thousand and six hundred only (M$33,600), the borrowers as beneficial owners hereby assigns unto the bank absolutely all their rights, title and interest in and to the said property and under the said agreement (the sale and purchase agreement) and the full benefit granted thereby and all remedies for enforcing the same.

Clause 5 of the assignment agreement in *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 was as follows:

> This assignment shall remain in force until such time as it shall be revoked by the execution and registration thereof by the assignor of the first legal charge over the said land in favour of the bank.

Clause 21 of the assignment in this case is similar to cl 5 of the assignment in the facts of *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* except for the fact that in the present case, an alternative condition is imposed, ie until all monies due to the bank is fully settled.

To my mind, the second condition means no more than that if the loan is fully settled the issue of the legal charge in the first condition would no longer arise; but if the loan is not settled and the document of title is issued then a proper charge document would be executed as spelt out in cl 20 and when either of these events happens, the position of the assignment in *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* and in this case will not be of any difference, in that the assignment 'shall be revoked by the execution and registration thereof by the assignor of the first legal charge over the said land in favour of the bank'. The Federal Court in *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* held that the assignment document was an absolute assignment and not one purporting to be by way of charge only within the meaning of s 4(3) of the Act. Such being the case, this court is bound by the finding of the Federal Court in *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* in holding that the assignment in this case given to the bank by the appellants is an absolute assignment within the meaning of the section.

The case of *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 therefore, is not applicable in this case because in the present case there was no undertaking given by the bank to pay any monies due under the said agreement entered into between the appellants and the respondents. The said assignment is exclusively the arrangement made between the appellants and the bank. The purpose of the loan is to finance the appellants in the purchase of the said property from the respondents and the bank had agreed to grant the loan to the appellants on the terms and subject to the conditions contained in the said assignment. The appellants are to repay the bank the loan by 180 equal monthly instalments of capital and interest. Therefore, the loan granted by the bank to the appellants is strictly a term loan and has nothing to do with the respondents. The authority of *Nouvau Mount Dor (M) Sdn Bhd v Faber Development Sdn Bhd* is for me to follow notwithstanding the passage quoted above in 6 *Halsbury's Laws of England* (4th Ed). More so, the passage in 6 *Halsbury's Laws of England* (4th Ed) is not based on the interpretation of s 4(3) of the Act.

A In relation to the further argument that the assignment in this case is not an absolute one, learned counsel for the appellants drew the court's attention to cl 24 of the assignment. Clause 24 is a provision appointing the general manager or the assistant manager of the bank as the appellants' attorney in dealing with the said property on behalf of the appellants. Learned counsel submitted that because of this provision the bank is B merely an agent of the appellants, following the case of *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170. This argument lacks merit because the provision is necessary for the purpose of enforcement against the said property in the event of default committed by the appellants in respect of the loan granted as spelt out in cll 10 and 22 thereof.

C Learned counsel also argued that the assignment in this case is not absolute because there was no written notice in writing of the assignment given to the respondents as required by s 4(3) of the Act. I do not think I can agree because there is an acknowledgement by the respondents of the assignment as found at the foot of the said assignment of 15 June 1983 to D the following effect.

> WE, NEWACRES SDN BHD of 10th Floor, Wisma Equity, 150 Jalan Ampang, Kuala Lumpur, do hereby acknowledge that on 15 June 1983 the foregoing assignment was intimated to us by the delivery of a true copy thereof and the same has been duly noted in our records.
>
> E SIGNED by CHIN KUM YOW
> for and on behalf of
> NEWACRES SDN BHD
> In the presence of

By the delivery of a true copy of the said assignment which is in writing, to F the respondents, the fact that the assignment by the appellants of all their rights, title and interest in and to the said property and under the said agreement and the full benefit granted thereby and all remedies for enforcing the same to the bank had been expressly communicated to the respondents, served as an express notice in writing given to the respondent for the purpose of s 4(3) of the Act.

G Now, having considered all the terms contained in the said assignment of 15 June 1983 and having considered the arguments from both sides and the authorities cited, I am satisfied that the instrument intends to pass all the rights of the appellants as assignor in the debt or chose in action to the bank as assignee absolutely and not purporting to be by way of charge only H of the debt or chose in action, and thus it falls within the ambit of s 4(3) of the Act. As such, the appellants as assignor has no locus standi to institute this action against the respondents. The learned magistrate was therefore right in her decision to dismiss the action of the appellants on that ground. The appeal of the appellants is, therefore, dismissed with costs to the respondents.

I *Appeal dismissed.*

Reported by Kanesh Sundrum